Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DANIEL MORRIS,

Petitioner,

v.

CRAWFORD COUNTY, ARKANSAS; BOB ROSS; JOHN McALISTER and LARRY G. RUIZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bennett Scott Nolan
Counsel of Record
Tanya Briana Spavins
NOLAN & CADDELL
404 North 7th Street
Fort Smith, AR 72901
Phone: (479) 782-5297
Fax:(479) 782-5184
Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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QUESTIONS PRESENTED

Whether the burden of proof imposed by the decision in *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) effectively eradicates any protection from unconstitutional municipal acts emanating from a single hiring decision.

Whether an injured party alleging a constitutional violation arising from a single hiring decision must produce evidence of "nearly identical" activity in the background of a municipal employee to meet the burden of showing that a particular constitutional injury was a "plainly obvious consequence" of hiring that person.

Whether episodes of domestic violence and other acts of violence performed out side the scope of employment may be considered when determining whether a municipality acted with deliberate indifference to the likelihood that a municipal employee would exercise excessive force if hired.

Whether the Eighth and Fifth Circuit Courts of Appeals have correctly applied the standards espoused by *Bryan County* to single hiring decision cases.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 299 F.3d 919 (8th Cir. 2002) and appears in the Appendix at 1a. The District Court opinion is reported at 173 F. Supp. 2d 870 (W.D. Ark. 2001) and appears in the Appendix at 14a. The Eighth Circuit's Order denying petition for rehearing and rehearing *en banc* is not reported but appears in the Appendix at 23a.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on August 12, 2002. (App. at 1a). The Court of Appeals entered an order denying a timely petition for rehearing and rehearing *en banc* on September 19, 2002. (App. at 23a).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected, any citizen of the United States

> or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....

Amendment IV to The United States Constitution states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....

Section 1 of Amendment XIV to The United States Constitution states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

While a detainee in Crawford County Jail, Daniel Morris suffered a severed intestine when Deputy Larry Ruiz performed a knee-drop maneuver on him while Morris was lying flat on his back on the concrete cell floor. It is this act that constitutes excessive force in violation of Morris' rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and therefore gives rise to this cause of action begun in the United States District Court for the Western District of Arkansas.

In this excessive use of force case, Morris alleged that Crawford County, Arkansas and Sheriff Ross[1] exhibited deliberate indifference to his constitutional rights when Sheriff Ross hired Deputy Larry Ruiz with full knowledge that Ruiz had an extensive history of violent behavior. Morris presented evidence that, before hiring Ruiz, Ross was aware that Ruiz had a felony conviction from the state of Oregon[2], had slapped an inmate and been disciplined for it while employed at Sebastian County Detention Center, had beaten his girlfriend resulting in a protective order being issued against him, had beaten his ex-wife resulting in a protective order being issued against him, and had exhibited other aggressive behaviors including threatening to "knock out" a nurse with whom he worked at Benton County Sheriff's Department.

The district judge denied the motions for summary judgment filed by the deputies in their individual capacities but granted summary judgment to them in their official capacities. The district judge also granted summary judgment to the Sheriff in both his individual and official capacity and to Crawford County, Arkansas.

To support his decision that "Ruiz's record...would not have lead a reasonable supervisor to conclude that there was an obvious risk that [Ruiz] would use excessive force if hired" (App. at 20a), the district judge disregarded the evidence of violence against the ex-wife and girlfriend stating that such

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[1] Crawford County, Arkansas and Sheriff Ross have admitted that Sheriff Ross is the policy maker for the Crawford County Jail.

[2] The State of Arkansas Executive Commission On Law Enforcement Standards and Training Rules and Regulations prohibit law enforcement agencies from hiring anyone with a felony conviction.

conduct "might reveal a propensity for violence against the women in his life, [but] does not translate into a high risk of using excessive force against detainees." (App. at 20a). The district judge diminished the significance of the slapping incident by highlighting the fact that it occurred four years prior to the incident with Mr. Morris and characterized it as an "isolated incident." (App. at 20a). Additionally the district judge diminished the relevance of the episodes of verbal threats against co-workers pointing out they occurred two years prior to the Morris incident and were nothing more than "mouthing off." (App. at 20a).

Morris appealed the district court's decision to the Eighth Circuit Court of Appeals who upheld the lower court decision. The Eighth Circuit relied on *Bryan County* in disregarding everything in Ruiz's background except the 1996 slapping incident.[3]

Morris timely petitioned for rehearing *en banc*. The petition was denied on September 19, 2002.

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[3] "Morris relies on *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992), for the proposition that violent or abusive behavior of any kind indicates a strong potential for violent behavior against persons in custody. We need not decide whether *Parrish* stands for such a proposition, however, because even if it did, *Bryan County* implicitly rejected such an argument in the context of municipal liability based on a single hiring decision." (App. at 10a)

REASONS FOR GRANTING THE PETITION

I. The Burden Imposed By *Board of Comm'rs of Bryan County v Brown* In A Single Hiring Decision Case Effectively Eradicates The Protections Granted By 42 U.S.C. §1983

It is clear that municipalities cannot be held liable under a theory of *respondeat superior*, but can only be held responsible for injury sustained as a result of a municipal custom or policy.[4] The injured party in such a case is, therefore already met with a burden beyond that typically applied in tort law. The holding in *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) creates an even finer distinction and thereby moves up the bar even further.

The new standard espoused in *Bryan County* requires an injured party alleging a constitutional violation arising from a hiring decision to show that the hiring decision was made with a conscious disregard, or deliberate indifference, to the high risk that the municipal employee will inflict a specific constitutional injury. The risk of the municipal employee inflicting the specific constitutional injury must be "plainly obvious" at the time the hiring decision is made. This is an impossible burden that cannot be met and therefore effectively eradicates any protections granted by 42 U.S.C. §1983 in the context of a hiring decision. Furthermore, this heightened and intricately stated burden is extremely difficult to apply and the Circuit courts that have attempted it so far have failed miserably.

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[4] *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978)

In the five years since *Bryan County* was handed down, no municipality has been held liable for a hiring decision. Municipalities have escaped liability on excessive use of force claims despite hiring officers with records of drawing his service weapon improperly, being too quick to draw his service weapon, being involved in use of force incidents while employed as an officer on a college campus, harassing and overbearing behavior, and reportedly pistol whipping and assaulting a teenager.

In the case at hand, the deputy's background was properly screened, and the Sheriff was aware that Ruiz had a felony conviction, two protective orders against him for beating up his ex-wife and girlfriend and had been suspended for slapping an inmate while employed at another detention facility. The Sheriff ordered Ruiz be hired despite his history of violent behavior. Once again, however, the municipality (Crawford County, Arkansas herein) escapes liability as the burden imposed by *Bryan County* is so high that even the hiring of this violent scofflaw does not meet the burden espoused in *Bryan County*.

II. The Current Holdings of The Eighth Circuit Court of Appeals and the Fifth Circuit Court of Appeals Reflects an Erroneous Application of *Bryan County*

In determining whether Deputy Ruiz's background met the "plainly obvious consequence" standard set out in *Bryan County*, the Eighth Circuit announced that "[t]he prior complaints in an applicant's background must be *nearly identical* to the type of officer misconduct that caused the constitutional deprivation...." (App. at 7a). In finding that Deputy

Ruiz's background lacked the requisite evidence, the Court relied on the fact that "Deputy Ruiz's background does not reveal that he knee-dropped an inmate (or anyone for that matter)...." (App. at 10a). In requiring such proof, the Eighth Circuit relied on two Fifth Circuit opinions, *Aguillard v. McGowen*, 207 F.3d 226 (5th Cir. 2000) *cert. denied* 531 U.S. 877 (2000) and *Gros v. City of Grand Prairie*, 209 F.3d 431 (5th Cir. 2000).

In *Aguillard*, the Fifth Circuit found a county not liable despite hiring Deputy McGowen who ultimately shot and killed a person during an arrest. McGowen's record revealed a report of assaulting and pistol-whipping a teenage boy only seven months before he was hired by the county. In finding that the evidence failed to show excessive use of force was a plainly obvious consequence of hiring McGowen, the Fifth Circuit observed "McGowen had never wrongfully shot anyone before, nor did his record reveal him to be likely to use excessive force in general or possess a trigger-happy nature in particular." *Id* at 230.

A month later, the Fifth Circuit was again faced with attaching municipal liability in light of a hiring issue. The City of Grand Prairie, Texas hired Officer Rogers who sexually assaulted two women during an arrest and detention. The Fifth Circuit announced that plaintiffs had the burden of producing evidence sufficient to show that "the obvious consequence of hiring Rogers would be that he would sexually harass, sexually assault, falsely arrest, use excessive force or illegally search or seize a third person." *Gros* at 434. Rogers' background revealed that while a security guard on a college campus he was involved in "back-to-back incidents where force was used", complaints against him for being harassing and overbearing during a traffic stop and that he was threatening and too quick to draw

his weapon among other complaints. Again, the Fifth Circuit focused on the fact that the officer had not committed the exact infraction in the past: "Rogers had never sexually assaulted, sexually harassed, falsely arrested, improperly searched or seized, or used excessive force against any third party." *Id* at 435.

If, as the Eighth and Fifth Circuits have held, a plaintiff must illustrate episodes of misconduct "nearly identical to the type of misconduct" that led to the constitutional injury at hand, then a law enforcement officer could repeatedly inflict severe and life threatening physical injuries on a series of third parties so long as he employed a different method each time. This is not the holding of *Bryan County* and certainly cannot be the intent of the United States Supreme Court.

III. The Question Presented Is Important

Congress enacted 42 U.S.C. §1983 to provide protection for "any citizen of the United States or other person within jurisdiction thereof" from:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws....

Literally millions of Americans are effected by the extraordinarily high burden set forth in *Bryan*

County. It effects every prisoner[5], detainee[6], potential arrestee[7], public school student[8] and municipal employee[9] in the United States. Hundreds of thousands of citizens of the Eighth and Fifth Circuits are subjected to an unreasonable and unconstitutionally heightened burden of proof thereby further limiting their opportunity to seek redress of the deprivation of their constitutionally protected rights. Certiorari must be granted to ensure that citizens of all Circuit Courts of Appeals have equal protection under the law and that the protections granted by 42 U.S.C. §1983 are equally available regardless of the Circuit in which the injured party resides.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Ceriorari should be granted.

Respectfully submitted,

Bennett Scott Nolan
Counsel of Record
Attorney for Petitioner
NOLAN & CADDELL
404 North 7th Street
Fort Smith, AR 72901
Phone: (479) 782-5297
Fax: (479) 782-5184

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[5] See *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998)
[6] See *Morris v. Crawford County, Arkansas et al*, 299 F.3d 919 (8th Cir. 2002)
[7] See *Gros v. City of Grand Prairie*, 209 F.3d 431 (5th Cir. 2000); *Aguillard v. McGowen*, 207 F.3d 226 (5th Cir. 2000); *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998)
[8] See *Riddick v. School Bd. Of city of Portsmouth*, 238 F.3d 518 (4th Cir. 2000)
[9] See *Griffin v. Cityof Opa-Locka*, 261 F.3d 1295 (11th Cir. 2001)

(Any footnotes trail the end of each document.)
No. 01-3621

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Daniel Morris,
Plaintiff-Appellant,

v.

Crawford County, Arkansas; Bob Ross;
John McAlister n1 ; Larry G. Ruiz,
Defendants-Appellees.

May 14, 2002, Submitted

August 12, 2002, Filed

COUNSEL:
For DANIEL MORRIS, Plaintiff - Appellant: Tanya Briana Spavins, NOLAN & CADDELL, Fort Smith, AR.

For CRAWFORD COUNTY, BOB ROSS, JOHN MCALISTER, Defendants - Appellees: Ralph Charles Ohm, Hot Springs, AR.

For LARRY G. RUIZ, Defendant - Appellee: Douglas Morrison Carson, DAILY & WOODS, Fort Smith, AR, Ralph Charles Ohm, Hot Springs, AR.

JUDGES:
Before BOWMAN, LOKEN, and BYE, Circuit Judges.

OPINIONBY:
BYE

OPINION:

BYE, Circuit Judge.

Daniel Morris appeals from an adverse grant of summary judgment on his deliberate indifference claim against Sheriff Bob Ross and Crawford County, Arkansas. For the reasons explained below, we affirm the district court's n2 judgment.

I

Morris was arrested and charged with driving while intoxicated and disorderly conduct. He was transported to the Crawford County Detention Center for a breathalyser test, but he refused to take the test. After deputies placed him in a cell, Morris and his cell-mate began to yell and bang on the cell door. Four deputies responded to the clamor. Morris alleges the deputies entered the cell, grabbed him by his arms and legs, and repeatedly assaulted him as they dragged him to another cell. In the new cell, Morris alleges he was forced to the floor and struck in the face by Deputy John McAllister. Morris also alleges Deputy Larry Ruiz dropped his full weight behind his knee into Morris's torso as he lay on his back on the floor. This "knee drop" severed Morris's intestine.

Morris brought an array of claims under 42 U.S.C. § 1983 against Crawford County, Sheriff Ross, Deputy McAllister and Deputy Ruiz; some of the defendants were sued both in their individual and official capacities. Of principal importance to this appeal, Morris's complaint included a wrongful hiring claim that alleged Crawford County was liable for Sheriff Ross's decision to hire Deputy Ruiz in 2000. n3

The district court granted summary judgment against Morris on the wrongful hiring claim. Although the district court believed Deputy Ruiz likely employed

excessive force in executing the "knee drop," the court determined there was insufficient evidence from which Sheriff Ross could have discerned "an obvious risk that [Deputy Ruiz] would use excessive force if hired." The district court therefore concluded Sheriff Ross's decision to hire Deputy Ruiz was not deliberate indifference, and, absent a showing of deliberate indifference on the part of Sheriff Ross, the court concluded Crawford County could not be held liable under § 1983.

The district court granted summary judgment on some, but not all, of the remaining claims in the action. Following entry of the court's order, Morris and the defendants took matters into their own hands, stipulating to a voluntary dismissal without prejudice of the outstanding claims. See Fed. R. Civ. P. 41(a)(1). The stipulation had the dual effect of resolving all claims against the defendants and bestowing us with appellate jurisdiction. See Chrysler Motors Corp. v. Thomas Auto Co., Inc., 939 F.2d 538, 540 (8th Cir. 1991).

Distilling this complicated procedural background to a palpable core, the present appeal requires us to evaluate three claims: the wrongful hiring claim against Crawford County, plus official and individual capacity claims against Sheriff Ross stemming from the same events. As the district court properly observed, the official capacity claim against Sheriff Ross is legally identical to the direct claim against Crawford County and must be so construed. Likewise, Morris insists that his individual capacity claim against Sheriff Ross pertains to the alleged wrongful hiring of Deputy Ruiz; in effect, Morris suggests a plaintiff may raise a deliberate indifference claim against a policy-maker in his individual capacity based on a single hiring decision. We need not decide whether this breed of individual capacity claim exists because it is readily apparent that

if it does, the claim would be identical to the official capacity claim. Thus, the three claims at issue in this appeal reduce to the single charge that Crawford County should be liable for Sheriff Ross's decision to hire Deputy Ruiz in 2000. Our analysis therefore proceeds as if but one claim remains.

II

We review the district court's summary judgment de novo, applying the same standard as the district court. Jeseritz v. Potter, 282 F.3d 542, 545 (8th Cir. 2002). Accordingly, we view the facts in the light most favorable to Morris and will affirm the summary judgment if there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Clark v. Kellogg Co., 205 F.3d 1079, 1082 (8th Cir. 2000).

III

Morris contends Sheriff Ross acted with deliberate indifference when he hired Deputy Ruiz. This claim requires us to determine whether Morris has demonstrated that Sheriff Ross's decision to hire Deputy Ruiz, with knowledge of his background, reflected a conscious disregard for a high risk that Deputy Ruiz would use excessive force in violation of Morris's federally protected rights. In making this determination, we seek guidance from the Supreme Court's decision in Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997).

A. Bryan County

In Bryan County, the Supreme Court addressed the issue of municipal liability under § 1983 for a single hiring decision made by a sheriff. Deputy Burns broke Jill Brown's knee caps when he forcibly removed her from the passenger's side of a truck driven by her

husband. Brown filed a claim for damages under § 1983 against Bryan County, alleging Deputy Burns used excessive force while arresting her, and that Deputy Burns's employer, Bryan County, was liable for her injuries based on its sheriff's decision to hire Deputy Burns. A jury agreed: Deputy Burns was held liable for using excessive force and Bryan County was held liable because of Sheriff Moore's decision to hire Deputy Burns, who had a record of driving infractions and had pleaded guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness. 520 U.S. at 401. The Fifth Circuit upheld the jury's verdict against Bryan County based on Sheriff Moore's decision to hire Deputy Burns in light of his rap sheet.

The Supreme Court, however, reversed the Fifth Circuit. Justice O'Connor observed that "cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause." Id. at 415. Concerned that municipal liability could very easily collapse into respondeat superior liability in the context of a single, facially lawful hiring decision, the Court adopted stringent culpability and causation requirements, noting that "[a] showing of simple or even heightened negligence will not suffice." Id. at 407.

The Court demanded that courts "carefully test the link between the policymaker's inadequate decision and the particular injury alleged." Id. at 410. "Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background

constitute 'deliberate indifference.'" Id. at 411. The Court proceeded to explain that

> a finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong.

Id. at 412. The Court ultimately concluded there was insufficient evidence on which a jury could base a finding that Sheriff Moore's decision to hire Deputy Burns reflected conscious disregard of an obvious risk that Deputy Burns would use excessive force. Id. at 415. Although Sheriff Moore's conduct may have "reflected indifference to [the officer's] record, ... what is required is deliberate indifference to a plaintiff's constitutional right." Id. at 414-15.

Bryan County teaches us that liability may not be imposed unless a plaintiff directly links the applicant's background with the risk that, if hired, that applicant would use excessive force. In other words, a plaintiff must show that the hiring decision and the plaintiff's alleged constitutional injury are closely connected – an applicant's background is that causal link. What then must an applicant's background reveal for a plaintiff's alleged injury to be the plainly obvious consequence of the hiring decision?

B. Post Bryan County Cases

Courts strictly adhere to Bryan County's directive that "the connection between the background of the particular applicant and the specific constitutional violation alleged must be strong." Id. at 412. The prior complaints in an applicant's background must be nearly identical to the type of officer misconduct that caused the constitutional deprivation allegedly suffered by a plaintiff. Courts routinely reject attempts to satisfy Bryan County's causal connection requirement where none of the prior complaints in an applicant's background were of the same or similar type of officer misconduct that caused the plaintiff's injury.

Aguillard v. McGowen, 207 F.3d 226 (5th Cir. 2000), involved an officer, Deputy McGowen, who shot and killed Susan Harrison White while on duty. White's estate brought a wrongful death action under § 1983 against the County based on its decision to hire Deputy McGowen. Deputy McGowen's record showed that, inter alia, he had threatened the mother of a juvenile with arrest, and had assaulted and pistol-whipped a teenage boy. Deputy McGowen, however, was neither arrested nor convicted of the alleged assault and pistol-whipping incident. His informal disciplinary record included infractions for using police radio for broadcasting personal messages and for refusing to convey information to one party in a car accident. The Fifth Circuit reversed the district court's judgment, which upheld the jury's verdict against the County, because the requisite causal connection was lacking; Deputy McGowen's record did not show "one shred of solid evidence foreshadowing McGowen's tragic killing of White." Id. at 230 (emphasis added). Aguillard explained "McGowen had never wrongfully shot anyone before, nor did his record reveal him to be likely to use excessive force in general or possess a trigger-happy nature in particular" and concluded that "while the County may have been negligent in its employment

decision, the magnitude of its error does not reach constitutional cognizance." Id.

Gros v. City of Grand Prairie, 209 F.3d 431 (5th Cir. 2000), involved a police officer who allegedly sexually assaulted two women during traffic stops. At the time of that officer's hire, his file contained statements regarding aggressiveness, letters of reprimand and complaints for being overbearing and abusive during a prior traffic stop. The Fifth Circuit reversed the district court's judgment, concluding the police chief was not deliberately indifferent in hiring the officer, because the requisite causal connection was absent. Id. at 435. The Fifth Circuit explained the officer "had never sexually assaulted, sexually harassed, falsely arrested, improperly searched or seized, or used excessive force against a third party." Id. While the officer's records suggested the police chief may have been negligent in hiring him, the Fifth Circuit determined the officer's records did not provide sufficient evidence of deliberate indifference to a third party's constitutional rights. Id.

Barney v. Pulsipher, 143 F.3d 1299 (10th Cir. 1998), involved a male correctional guard, Gerald Pulsipher, who allegedly sexually assaulted several female inmates. Pulsipher had been arrested at age seventeen for possession of alcohol and had several speeding tickets. The Tenth Circuit explained there was nothing in Pulsipher's background that would have indicated he would have committed sexual assault on the inmates. Id. at 1309. In other words, the plaintiffs had failed to satisfy the strong causal connection required by Bryan County.

Riddick v. Sch. Bd. of the City of Portsmouth, 238 F.3d 518 (4th Cir. 2000), involved a male coach who secretly videotaped members of the female high school track team while undressing. Three years prior, in 1989, the coach had been investigated for openly filming fully-

clothed female students. Although the coach had been investigated for that incident, the Fourth Circuit concluded summary judgment in favor of the School Board was appropriate because it was not plainly obvious the coach would secretly videotape other students while undressing nearly three years later. Id. at 525. "Put simply, the causal connection between the 1989 incident and the alleged constitutional deprivation is simply too attenuated to impose municipal liability on the Board." Id. at 526.

These cases also reveal that municipalities are not necessarily liable even when an applicant's background contains complaints of physical violence, including acts of aggression and assault. For example, in Aguillard, although Deputy McGowen's record included complaints of assault and threatening behavior, it did not reveal that he had ever wrongfully shot anyone before or used excessive force. In Gros, although the officer's record revealed that he was aggressive and that he had been abusive during a previous traffic stop, it did not reveal that he had ever sexually assaulted, sexually harassed, falsely arrested, improperly searched or used excessive force. Courts have determined that such complaints must be closely aligned with a plaintiff's alleged injury, and absent that close nexus, there can be no municipal liability based on a single hiring decision. In sum, to avoid summary judgment, a plaintiff must point to prior complaints in an applicant's background that are nearly identical to the type of misconduct that causes the constitutional deprivation allegedly suffered by the plaintiff. This is a rigorous test to be sure.

C. Application of Bryan County

Has Morris presented evidence sufficient to create a genuine issue of material fact that the plainly obvious consequence of rehiring Deputy Ruiz would be his use

of excessive force against an inmate? We do not believe he has.

Morris claims Deputy Ruiz's record contains a violent felony conviction. As noted by the district court, however, the record does not reveal that the conviction was for a violent felony offense. See Appellant's App. 264. During oral argument, moreover, we learned that, after Deputy Ruiz paid a fine, it appears the conviction was reduced to a misdemeanor, and was ultimately expunged from his record.

Deputy Ruiz's background does not reveal that he knee-dropped an inmate (or anyone for that matter), nor does it reveal a single complaint of excessive force. Deputy Ruiz's record includes slapping an inmate at the Sebastian County Detention Center in 1996; mishandling inmates' money and property; "mouthing off" to two fellow deputies at Sebastian County and "inviting [one of them] to the gym any day, any time ... to take care of it" in 1997; disobeying a nurse during which the nurse overheard Deputy Ruiz say "he was going to knock that bitch out"; and acting insubordinate at work, disobeying orders, cursing other employees, failing to adhere to rules (i.e., leaving his post with no officer on duty and failing to answer his radio when a supervisor attempted to contact him). There are also accusations by Deputy Ruiz's ex-wife that, in 1997, he ran her off the road, tore a necklace off her neck, and pushed her, as well as accusations by Deputy Ruiz's girlfriend that, in 1999, he grabbed her arm and threw her, and threatened to assault her.

Morris emphasizes Deputy Ruiz's past incidents of domestic violence, arguing such acts portend violence in the workplace. Both Deputy Ruiz's ex-wife and girlfriend obtained ex parte protective orders against him, but none of their claims were ever substantiated. Morris relies on Parrish v. Luckie, 963 F.2d 201 (8th Cir.

1992), for the proposition that violent or abusive behavior of any kind indicates a strong potential for violent behavior against persons in custody. We need not decide whether Parrish stands for such a proposition, however, because even if it did, Bryan County implicitly rejected such an argument in the context of municipal liability based on a single hiring decision. The plaintiff in Bryan County retained an expert witness who testified that Deputy Burns's arrest record showed "a blatant disregard for the law and problems that may show themselves in abusing the public or using excessive force." 520 U.S. at 429. In fact, Bryan County's own expert opined that Deputy Burns's record should have caused concern. Id. Despite this evidence, the Court concluded the plaintiff had not demonstrated that Sheriff Moore's decision to hire Deputy Burns constituted deliberate indifference. Id. at 415.

Morris also stresses the jail administrator's statement to Sheriff Ross that Deputy Ruiz would cause trouble if hired, and relies on an expert witness who testified that violent or abusive behavior of any kind indicates a strong potential for violent behavior against persons in custody. The jail administrator made the statement to Sheriff Ross in 1997, when Deputy Ruiz was first hired to work at the Crawford County Detention Center. Deputy Ruiz did cause trouble and was fired, but not because he was violent with inmates or displayed any violent propensity toward inmates; he was fired for insubordination, failing to answer his radio and leaving his post. With respect to the expert testimony, as noted above, Bryan County considered similar evidence and concluded it did not carry the day.

Morris attempts to distinguish his case from Bryan County, arguing Deputy Ruiz's record reveals several separate instances of violence, whereas Deputy Burns's

record revealed only one incident that produced several violent charges. But the facts of record do not substantiate Morris's distinction. The 1996 slapping of an inmate by Deputy Ruiz is the only violent act in his record. It is true that ex parte protective orders were obtained against Deputy Ruiz by both his ex-wife and girlfriend, but they are unsubstantiated accusations. More importantly, it is the nature of the prior complaints with which we are concerned. We do not believe the complaints mentioned above satisfy Bryan County's requirement of a "strong" causal connection between Deputy Ruiz's background and the specific constitutional violation alleged by Morris. We agree with the district court's assessment that "[Deputy] Ruiz's record may have made him a poor candidate for a position as a detention center deputy, but it would not have lead [sic] a reasonable supervisor to conclude that there was an obvious risk that he would use excessive force if hired." See Appellant's App. 265.

IV

We believe Morris has failed to present evidence sufficient to create a genuine issue of material fact that Sheriff Ross acted with deliberate indifference when he hired Deputy Ruiz. Accordingly, the district court's summary judgment in favor of Sheriff Ross and Crawford County is affirmed in its entirety.

Footnotes

n1 In their brief, defendants refer to "John McAllister." a usage we adopt herein.

n2 The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas.

n3 To be precise, Deputy Ruiz was rehired by Sheriff

Ross in 2000. Sheriff Ross had initially hired Deputy Ruiz to work at the Detention Center in June 1997, but he later fired Deputy Ruiz in September 1997 for disobeying his supervisor, failing to answer his radio and leaving his post.

CASE NO. 01-2053

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

DANIEL MORRIS,
PLAINTIFF

v.

CRAWFORD COUNTY, ARKANSAS, et al.,
DEFENDANTS

October 23, 2001, Decided

October 23, 2001, Filed

COUNSEL:
For Plaintiff: Tanya B. Spavins, Nolan, Caddell & Reynolds, Fort Smith, AR.

For Defendants: Ralph C. Ohm, Crawford County, Hot Springs, AR.

For Defendants: Ben Core, Daily & Woods, Fort Smith, AR.

JUDGES:
Robert T. Dawson, United States District Judge.

OPINIONBY:
Robert T. Dawson

OPINION:

ORDER

Plaintiff brings this action asserting a cause of action under 42 U.S.C. § 1983 and a state-law battery claim. Plaintiff alleges that he was subjected to excessive force while detained in the Crawford County Detention Center (CCDC). He names as Defendants Crawford County, Arkansas, and Sheriff Bob Ross, Deputy John McAllister, and Deputy Larry Ruiz, individually and in their official capacities. n1 The Court previously denied Deputy Ruiz's motion for summary judgment in his individual capacity, finding that he was not entitled to qualified-immunity, as there was evidence that he used a "knee drop" on Plaintiff, thereby severing Plaintiff's intestine, when Plaintiff may not have been offering any resistance. Currently before the Court is a motion for summary judgment on Plaintiff's claims against Deputy Ruiz in his official capacity, his claims against Deputy McAllister and Sheriff Ross in both their individual and official capacities, and his claims against Crawford County.

In determining whether summary judgment is appropriate, the facts and inferences from the facts are viewed in the light most favorable to the non-moving party. Further, the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Nat'l. Bank of Commerce of El Dorado, Arkansas v. Dow Chem. Co., 165 F.3d 602 (8th Cir. 1999).

Official-Capacity Claims

The claims against Sheriff Ross and Deputies McAllister and Ruiz in their official capacities are deemed to be the same claims made against Crawford

County. See Liebe v. Norton, 157 F.3d 574, 578-79 (8th Cir. 1998). Plaintiff's official-capacity claims against these Defendants are accordingly dismissed as redundant.

Deputy McAllister in his Individual Capacity

Deputy McAllister contends that the only force he used on Plaintiff was a single "backhand" to the side of his face and that he used this force because Plaintiff "grabbed at" him when he was trying to exit Plaintiff's cell. Deputy McAllister argues that he is entitled to summary judgment, as the force he used was reasonable under the circumstances and that Plaintiff did not sustain any type of injury. Deputy McAllister further argues that even if the force he used against Plaintiff were to be deemed excessive, he is entitled to qualified immunity.

Plaintiff disputes Deputy McAllister's version of events and submits a sworn statement from Deputy Ron Long, who witnessed the incident. According to Deputy Long, Plaintiff was lying on his back on the floor of his cell, not resisting in any way, when Deputy McAllister "hit [Plaintiff] several times in the face . . . [then] made a comment if you want anymore, just call me and I will be glad to come back and give you some more of this . . . and then he moved way and . . . [Ruiz] went down on his knee into the torso of [Plaintiff]." (Doc. 35 Ex. C.) Plaintiff contends that he sustained bruises as a result of the blows administered by Deputy McAllister.

Viewing the facts in this case in the light most favorable to Plaintiff, there is little doubt that striking a detainee in the face several times when he is not resisting constitutes excessive force. Further, while Plaintiff's bruises may not constitute an injury "of great significance," they nevertheless constitute an actual injury and that is what is required for an excessive-force

claim to be compensable. See Howard v. Barnett, 21 F.3d 868, 872-73 (8th Cir. 1994). Deputy McAllister is not entitled to qualified immunity for the alleged use of excessive force, as Plaintiff's right to be free of such force was clearly established, that is Deputy McAllister could not have reasonably but erroneously believed that his conduct was lawful. See Saucier v. Katz, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151, 2158 (2001)(qualified immunity does not shield conduct which violates clearly established rights; inquiry in determining whether a right is clearly established is whether officer could have reasonably but erroneously believed that his conduct was lawful). Accordingly, Plaintiff's excessive-force claim against Deputy McAllister in his individual capacity is not appropriate for summary judgment.

State-law Battery Claim

Plaintiff asserts a battery claim against Deputies Ruiz and McAllister. Defendants argue that they are entitled to summary judgment on this claim, as they are immune under Arkansas Code Annotated § 21-9-301. Defendants' argument is without merit, as this statute does not shield intentional torts such as battery. See West Memphis Sch. Dist. V. Circuit Court of Crittenden County, 316 Ark. 290, 871 S.W.2d 368, 371 (Ark. 1994).

Sheriff Ross in his Individual Capacity

Sheriff Ross argues that he is entitled to summary judgment, as he was not personally involved in the use of force on Plaintiff, there is no proof that he failed to adequately train or supervise the deputies involved, and there were policies and practices in place to prevent the use of excessive force on detainees. Sheriff Ross argues that even if he did engage in conduct that somehow violated Plaintiff's rights, he is entitled to qualified immunity. Plaintiff responds that Sheriff Ross acted

with deliberate indifference in hiring Deputy Ruiz, as Deputy Ruiz had a prior felony conviction for an unspecified offense from the State of Oregon; he had an extensive history of misconduct at two other detention facilities, ranging from threatening other deputies to slapping an inmate; he had previously worked at and been terminated from CCDC for disobeying a direct order not to leave his post; and two protective orders had been issued against Ruiz in the past for violent behavior towards his ex-wife and girlfriend. Plaintiff also argues that Sheriff Ross condoned Deputy Ruiz's use of force against Plaintiff after the fact by failing to terminate him until approximately two weeks later when three other inmates complained of Ruiz harassing them.

Sheriff Ross may be held individually liable under Section 1983 if he directly participated in the alleged use of excessive force or if his failure to properly supervise or train the offending deputies caused the use of excessive force. See Andrews v. Fowler, 98 F.3d 1069, 1078 (8th Cir. 1996). The standard for liability is whether Sheriff Ross was deliberately indifferent to or tacitly authorized the use of excessive force. See id. Plaintiff has offered no evidence of any direct involvement or failure to train or supervise on Sheriff Ross's part that can be said to have caused the alleged use of excessive force. Even if, as Plaintiff contends, Sheriff Ross condoned Deputy Ruiz's conduct by failing to immediately terminate him, this occurred after the fact and thus did not cause Ruiz's conduct.

We next address Plaintiff's argument that Sheriff Ross was deliberately indifferent in hiring Deputy Ruiz. To establish that Sheriff Ross's hiring decision amounted to deliberate indifference, Plaintiff must prove that adequate scrutiny of Deputy Ruiz's background would have lead a reasonable supervisor to

conclude that Deputy Ruiz's use of excessive force would be a plainly obvious consequence of the hiring decision. See Board of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 411, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997). A finding of culpability depends on whether Deputy Ruiz was "highly likely to inflict the particular injury suffered by the plaintiff." Id. At 412.

Deputy Ruiz's record included a prior felony conviction, but there is no indication that it was for a violent offense. With regard to Deputy Ruiz's misconduct during his prior period of employment at CCDC and at two other detention facilities, only a few of these infractions would be relevant to any propensity for violence. First, in 1996, Deputy Ruiz was suspended briefly and placed on six months probation for slapping an inmate at the Sebastian County Detention Center. In 1997, Deputy Ruiz was reprimanded for "mouthing off" to two fellow deputies at Sebastian County and "inviting [one of them] to the gym any day, any time . . . to take care of [it] ." In 1998, the Benton County Detention Center issued a warning report against Deputy Ruiz after he had acted disobedient towards a nurse and the nurse overheard him say "he was going to knock that bitch out." As to the two protective orders issued against Deputy Ruiz, the first was issued in 1997, after Ruiz's ex-wife accused him of running her off the road, tearing a necklace off her neck, and pushing her. The second protective order was issued in 1999, after Ruiz's girlfriend accused him of grabbing her arm and throwing her and of having threatened and assaulted her before.

In Bryan County, the officer alleged to have used excessive force had a criminal record that included resisting arrest and assault and battery. Looking at this record, the Supreme Court held that the sheriff's failure to examine the officer's criminal record did not reflect a conscious disregard to a high risk that the officer would

use excessive force. Likewise, in the present case, Deputy Ruiz's record did not reveal a high risk that he would use excessive force. While Deputy Ruiz had slapped an inmate at another detention facility, this occurred approximately four years prior and it was an isolated incident. While Deputy Ruiz may have also made what could be construed as threatening remarks towards three other detention center personnel, the most recent of these incidents occurred two years prior and there is no indication that these incidents were anything more than "mouthing off." As to the two protective orders issued against Deputy Ruiz, while they might reveal a propensity for violence against the women in his life, this does not translate into a high risk of using excessive force against detainees.

Ruiz's record may have made him a poor candidate for a position as a detention center deputy, but it would not have lead a reasonable supervisor to conclude that there was an obvious risk that he would use excessive force if hired. Accordingly, Sheriff Ross' decision to hire Ruiz did not constitute deliberate indifference. Cf. Gros v. City of Grand Prairie, 209 F.3d 431, 435-36 (5th Cir. 2000) (although there were scattered statements in officer's pre-employment file suggesting that he was sometimes too aggressive, overbearing, and abusive during traffic stops, police chief, in hiring officer, was not deliberately indifferent to risk that he would sexually assault women during traffic stops; evidence did not establish strong causal connection between officer's background and particular violations asserted).

Based on the foregoing, the Court concludes that Plaintiff's claims against Sheriff Ross in his individual capacity are subject to summary judgment, as there is no evidence that Sheriff Ross was directly involved in the alleged use of excessive force, that any failure to train or supervise on his part caused it, or that he acted

with deliberate indifference in hiring Deputy Ruiz. Given this conclusion, it is not necessary to address whether Sheriff Ross would be entitled to qualified immunity.

Crawford County

Under Section 1983, a municipality can be held liable for the unconstitutional acts of its employees if a municipal policy or custom was the moving force behind the constitutional violation. See Monell v. Department of Soc. Servs., 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Plaintiff argues that as Sheriff Ross is the policy maker for CCDC, his decision to hire Deputy Ruiz is attributable to the county. As discussed above, however, Sheriff Ross's decision to hire Ruiz did not constitute deliberate indifference and thus, it provides no basis for municipal liability.

Conclusion

Defendants' motion for summary judgment is hereby GRANTED IN PART and the following claims are hereby DISMISSED: Plaintiff's claims against Defendants Ruiz and McAllister in their official capacities; Plaintiff's claims against Defendant Ross in both his individual and official capacities; and Plaintiff's claims against Crawford County. Defendants' motion is DENIED in all other respects and Plaintiff's claims for excessive force and battery against Defendants Ruiz and McAllister in their individual capacities will proceed to trial as scheduled on November 5, 2001. While Defendants Ruiz and McAllister may prevail on these claims at trial, there are genuine issues of material fact that preclude a finding in their favor at the summary judgment stage.

IT IS SO ORDERED this 23rd day of October 2001.

Robert T. Dawson

United States District Judge

Footnotes

n1 Plaintiff originally named Deputies Jerry Pittman and Donnie Threet as additional Defendants, but they were dismissed by joint stipulation of the parties.

No. 01-3621

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Daniel Morris,
Appellant,

v.

Crawford County, Arkansas, et al.,
Appellees.

September 19, 2002, Decided

OPINION

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 19, 2002